United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1363

To be Argued by
Nancy Rosner

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -X

UNITED STATES OF AMERICA

-v-

ANTHONY GUARDINO,

Defendant-Appellant

- -X

On Appeal from the United States District
Court for the Eastern District of New York.

BRIEF FOR APPELLANT

NANCY ROSNER, ESQ.
Attorney for Appellant
401 Broadway
New York, New York 10013
(212) 925-8844

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UNITED STATES OF AMERICA

-against-

ANTHONY GUARDINO,

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

The appellant Anthony Guardino was charged in a two count indictment in the Eastern District of New York with possession and distribution on May 1, 1975, of 52 grams of cocaine. Because the charges in the indictment incorrectly reflected the weight of the cocaine, a superseding information was filed charging Appellant with possession of 26.91 grams of cocaine. Appellant pled guilty to that offense in satisfaction of the charges in the indictment on April 27, 1976.

That plea was the result of discussions between defense counsel and Assistant United States Attorney Stanley Teitler, assigned to the prosecution of the case. Because of his age and previous record Appellant qualified for sentencing as a young adult offender pursuant to 18 U.S.C. §4209. Defense counsel sought a promise that the government would recommend such treatment in exchange for a plea but was informed that office policy prohibited such a position (a 29)*. However, a disposition was agreed upon whereby, in return for appellant's plea, the government would inform the sentencing judge that it did not oppose such treatment (a 29):

> "In addition to that I have discussed with Mrs. Rosner the possibility of the defendant being placed on Young Adult Offender treatment. I have explained to Mrs. Rosner that the policy of our office is neither to oppose nor favor any type of sentencing. I made it very clear to Mrs. Rosner, in view of that, that the government would not oppose such type of sentence being imposed on Mr. Guardino."

Shortly before sentence was scheduled to be imposed the Assistant United States Attorney transmitted a letter to the Court which stated (a 5):

> " I have reviewed the Probation Report in the above matter and note that it fails to record that within the past month Anthony Guardino has threatened to kill the Government informer in this case. Two threats have been communicated to our informant, both of which were received

* Numbers in parentheses refer to pages in the Appellant's Appendix.

by him through an intermediary. One threat was transmitted directly by Mr. Guardino to the intermediary and the other emanated from another source.

We feel that this information is extremely relevant in your determination of the appropriate sentence to be imposed upon Mr. Guardino on June 25, 1976."

Thereafter sentence was adjourned to afford Appellant's counsel an opportunity to submit authorities to the Court to demonstrate that the government's communication violated both the letter and the spirit of its plea agreement.

On July 20, 1976 the Court heard oral argument on the Appellant's motion to have the sentencing moved before another judge who would not be exposed to the June 24, 1976 letter. That application was denied and the Court proceeded to sentence the Appellant.

Appellant's counsel strongly urged the imposition of Young Adult Offender treatment so that the appellant would not be incarcerated in a regular penal institution for several reasons. At the time Appellant was 24 years old. Shortly after his arrest he had cooperated to the extent of truthfully revealing his source for the narcotics he was charged with possessing. However he declined to testify for the government because he feared for his life. Nor were his fears insubstantial. Just prior to his own sentence

Appellant's father had been sentenced and remanded in the same courthouse and Appellant feared retaliation not merely from the source he had implicated but from his family and other acquaintances in his neighborhood.

Apparently the Court was acquainted in some degree with the subject of Appellant's cooperation prior to the sentencing proceeding. (a 16,18-19):

> "THE COURT: Let me stop you right there, and I have somewhere in the back of my mind some recollection of some discussion b --- I think it was with Mr. Alderstein as to whether of [sic] this defendant might or might not be available for some cooperation."
>
> * * *
>
> THE COURT: I think we have a case here pending awaiting trial where this man has information; Am I correct, Mr. Teitler?
>
> MR. TEITLER: That is correct, your Honor.
>
> THE COURT: As far as I know there's been no indication at least up to date, that he's going to give it. I would take one view of this case where he could take that road, and quite a different view of this case if you take the road that you suggest.
>
> MRS. ROSNER: Judge, I don't think it's appropriate for the Court to penalize an individual.
>
> THE COURT: I am not penalizing him.
>
> MRS. ROSNER: For a desire to cooperate and change his identity and change ---
>
> THE COURT: Don't put words in my mouth, please. It's not a question of penalty. You are asking for the man to get a break. I am saying the Court would if they gave the Government a break."

After counsel had finished her remarks, the Court addressed the Appellant on the subject of his cooperation (a 20-21):

THE COURT: Mr. Guardino, do you wish to say anything?

DEFENDANT: Just that I am sorry, your Honor, for what has occurred here, and I want to make amends.

THE COURT: Well, I think the Court has given every indication of how it thinks how amends can be made, and I am perfectly willing to give you time in which to consider whether you wish to make amends. If that's what you feel, that you need more time.

THE DEFENDANT: Your Honor, I know of certain people who have cooperated with the Government and were promised by the Government they would be protected and they were not. They winded up dead. And I won't threaten my life. I am too young to do that.

THE COURT: Well, that's your choice, and it's your approach to the problem. You must understand the problem you present anyway.

THE DEFENDANT: I do, your Honor. I only hope that your Honor will take into consideration how I feel about it.

THE COURT: I understand your feelings. I mean I respect your feelings, and I understand your feelings. You can make it so easy for me or you can make it difficult for both of us. Do you want to take a week and think about it?

THE DEFENDANT (no verbal response)

THE COURT: You are shaking your head no.

THE DEFENDANT: No, your Honor.

THE COURT: All right.

In view of the seriousness of the offense and the defendant's prior criminal record, this Court finds that the Youth Corrections Act is not advisable for this defendant in this case and accordingly imposes the following sentence:

It is adjudged that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of six years and that defendant shall become eligible for parole under 18 U.S.C.A. Section 4205(b)(2) at such time as the Board of Parole may determine and at the termination of such sentence defendant shall serve a special parole term of ten years."

The appellant is presently incarcerated at the federal penitentiary at Lewisburg.

POINT I

THE GOVERNMENT BREACHED ITS AGREEMENT NOT TO OPPOSE YOUNG ADULT OFFENDER TREATMENT FOR THE APPELLANT BY TRANSMITTING INFORMATION TO THE COURT CONCERNING AN ALLEGED THREAT TO THE INFORMANT WHICH THE GOVERNMENT CHARACTERIZED AS "EXTREMELY RELEVANT" TO THE DETERMINATION OF THE APPROPRIATE SENTENCE.

No lengthy texts need be penned to support the proposition that the government's adherence to its promises in negotiated pleas of guilty is mandated by our concept of due process and manifestly necessary to the administration of the criminal justice system. Here a promise was made and there is no dispute that in reliance upon it the appellant pled guilty. The issue presented to this Court for resolution is whether the government's letter to the sentencing court violated that agreement.

At the time the plea was taken the terms of the agreement were spread on the record. (a 29):

> "In addition to that I have discussed with Mrs. Rosner the possibility of the defendant being placed on Young Adult Offender treatment. I have explained to Mrs. Rosner that the policy of our office is neither to oppose nor favor any type of sentencing. I made it very clear to Mrs. Rosner, in view of that, that the government would not oppose such type of sentence being imposed on Mr. Guardino."

At the time of sentence the prosecutor recounted the pre-pleading negotiations in somewhat greater detail (a 9-10):

> "...[W]hen Mrs. Rosner originally approached me concerning our initial plea bargaining agreement, the prospect of the Youthful Offender treatment did come up, and my explanation was that certainly I would not say anything at the time of sentence with respect to any sentence, because that was not within the purview of the prosecutor's function, at least in the Eastern District of New York, in the absence of exceptional circumstances.
>
> At the time I made the statement I would not oppose it and I will not recommend it, and it's the statement I made throughout these proceedings, and it's the statement I made to the Court."

As the prosecutor candidly admitted, the agreement included a promise that he "would not say anything at the time of sentence with respect to any sentence". (emphasis added).

Yet by the government's own characterization the allegation in the June 24th letter were "extremely relevant in your determination of the appropriate sentence." That these two positions cannot live in harmony is perfectly apparent.

Some reconciliation might be attempted by construing the government's promise to mean that they would not recommend a particular type of sentence or number of years. However such a reading ignores the plain words "I would not say anything at the time of sentence" and ignores the plain

reality that when the government characterizes a piece of pèrjorative information as "extremely relevant" to sentencing the inference need not be drawn out in so many words. They lead to the conclusion that the government has taken a position on sentencing. This is precisely what it had agreed to refrain from doing.

Nor was the government without a means to deal with the information it felt compelled to divulge in violation of its agreement. The allegations in the June 24th letter, if reliable certainly provided the basis for a further criminal prosecution. Indeed, the charges there arguably could be viewed as more serious than those for which the Appellant stood convicted. If unreliable, the allegations certainly had no place in the sentencing proceedings quite apart from the government's agreement to stand mute. To date Appellant has not been charged on the basis of these allegations. They have been relied on only to infect the sentencing proceeding in violation of the government's explicit agreement.

In United States v. Crusco, 536 F.2d 21 (3d Cir. 1976) the government had likewise made a promise not to take a position on sentencing. At the sentencing defense counsel pleaded for leniency and disputed the Drug Enforcement Administration's characterization of the defendant's criminal stature.

The government responded by reminding the court of the details of the offense to which the defendant had pled and informed the court of a subsequent offense for which the defendant had been arrested while on bail.

The government sought to justify its response on three bases.

First, they argued that defense counsel had misrepresented the facts and the government was obliged to insure the integrity of the proceedings by setting the record straight. Though no such contention is possible here, it is interesting to note that the Court found even this justification foreclosed by the agreement to take no position on sentence.

Second, the government claimed its comments were harmless because it expressly declared that it was leaving the sentencing decision to the court. In response the court correctly noted that Santobello foreclosed any inquiry into the effect on the court of the government's breach of promise. Santobello v. New York, 404 U.S. 257 (1971). The inquiry is not into the fairness of the court but into the breach of the government's duty.

Finally, the government argued in Crusco as it did in the court below, that its remarks were not violative of the

agreement not to take a position on sentence because no specific terms were recommended. The Third Circuit rejected that argument:

> " The Government's final argument that it would have breached the plea bargain only if it had actually recommended the terms of a sentence is thus answered. We believe that such a strict and narrow interpretation of its commitment is untenable, and we must reject it. An unqualified promise of the prosecution not to take a position on sentencing obviously jeopardizes the Government's position in the sentencing process and may require the government to remain silent when it should stand up and speak. The Government, therefore, must also clearly understand the scope and depth of its commitment and the need for precision in plea bargaining. It may reach port in the plea bargaining process but founder there because of careless or loose language in its commitment. Once it makes a promise, Santobello requires strict adherence."

536 F.2d at 26.

Nor is the Crusco Court alone in its strict enforcement of the government's obligations. In United States v. Brown, 500 F.2d 375 (4th Cir. 1974) the government promised to recommend a three year concurrent sentence to be served at a particular institution. It was the clear understanding that the court was not bound to accept that recommendation. At the time of sentence the prosecutor mouthed the words of the recommendation but indicated he

"had some problems with it". The ourt held the promise breached since the defendant had bargained not for a formal recitation but for sound advice expressed with some degree of advocacy. The court said the test was purely objective; the reasons for and effect of the breach being irrelevant.

Indeed, United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973) has construed a promise not to oppose probation to have vitality even in the context of a motion to reduce a sentence where the promise was kept at the time of the original sentence.

Having established the breach, the remedy is likewise clear. The sentence must be vacated and the matter remanded to a different district judge for the government to comply with its representation. See United States v. Vale, 496 F.2d 365 (5th Cir. 1974).

POINT II

THE SENTENCE MUST BE VACATED BECAUSE THE RECORD STRONGLY SUGGESTS THAT THE DISTRICT JUDGE SENTENCED THE APPELLANT BECAUSE HE REFUSED TO WAIVE HIS 5TH AMENDMENT PRIVILEGE BY COOPERATING WITH THE GOVERNMENT.

In recent years, faced with the unhappy spectacle of disparity in sentencing, courts have been alert to the problems of sentencing. See e.g. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) when the court found that the sentencing judge had arbitrarily singled out a minor defendant for a more severe sentence than his codefendants and exercised its supervisory jurisdiction to review the sentence. They have been quick to demand accuracy in the information provided the sentencing judge and ready to review the consideration motivating a sentence at least where evidence of the court's rationale appears in the record.

In the area of sentencing, courts have interpreted due process to require that a defendant not be penalized for the exercise of his constitutional rights. Clearly the imposition of a sanction as severe as the loss of liberty destroys the value of the right. Griffin v. California, 380 U.S. 609 (1965). Thus sentencing may not be predicated on the

defendant's having pleaded not guilty and requiring a trial. United States v. Derrick, 519 F.2d 1 (6th Cir. 1975). Nor may a court rely on the defendant's silence either at trial or on sentence in fixing sentence. United States v. Briscoe, 518 F.2d 95 (1st Cir. 1975).

However scrutiny of a court's rationale is often impossible from the scanty remarks of many judges in passing sentence. Hence, appellate courts have suggested that the trial judges state their reasons on the record. United States v. Driscoll, 496 F.2d 252 (2d Cir. 1974). When reasons do appear in the record appellate courts presume them to have been relied on in fixing sentence. United States v. Schwartz, 500 F.2d 1350 (2d Cir. 1974).

In Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975) the defendant testified at trial and was convicted. At sentencing he continued to refuse to admit guilt. Though the judge did not explicitly state that this was a factor, the appellate court inferred as much in a pattern of lighter sentencing for those who admitted guilt and vacated the sentence.

In United States v. Rodriguez, 498 F.2d 302 at 312 (5th Cir. 1974), the Court explained the policy:

> " In Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), we held it a clear abuse of

> discretion for the sentencing judge to threaten the man before him with a more severe sentence if he did not "come clean" and admit his guilt. As we explained, the defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence. This was precisely the situation in which the trial judge placed Garcia, Tamez, Rodriguez, and Vega when they appeared before him for sentencing."

See also United States v. Wright, 533 F.2d 214 (5th Cir. 1976); Bertrand v. United States, 467 F.2d 901 (5th Cir. 1972); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

In United States v. Rogers, 504 F.2d 1079 (5th Cir. 1974) this rule saw its logical extension in a case where the "defendant was urged to 'sing' about others involved in the conspiracy." United States v. Wright, supra at 216. The Court said at 1085:

> " Until now we have had no occasion to address ourselves to the situation sub judice where the trial court did not ask Rogers to directly confess his guilt, but rather to sing about others involved in the conspiracy. But we view this as a distinction without a difference."

See also Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

Nor is United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970) to the contrary. In that case this Court noted that a judge may not impose a "price tag" on the defendant's silence at the time of sentence. 436 F.2d at 76.

However, the Court concluded that the sentence was not enhanced by such an impermissible factor.

The defendant need not show more than that the record might be construed to suggest the contention that an impermissible consideration entered the sentencing process in order to require that the sentence be vacated so that both substance and the appearance of justice are maintained. United States v. Schwartz, supra. However, the remarks of the sentencing court here clearly show that the appellant's sentence was predicated on his failure to cooperate.

First, the Court was aware of the defendant's ability to cooperate in a pending case and his lack of desire to do so prior to the sentencing allocation:

> THE COURT: I think we have a case here pending, awaiting trial where this man has information; Am I correct Mr. Teitler?"

(a 18).

Second the Court affirmatively suggested that the appellant cooperate in exchange for protection from the government.

Third, when the appellant continued to decline the proposition, the Court suggested an adjournment of the sentence to afford the appellant the opportunity for further reflection, an unwarranted delay unless cooperation were relevant to the sentence:

> THE COURT: Well, I think the Court has given

every indication of how it thinks how amends can be made, and I am perfectly willing to give you time in which to consider whether you wish to make amends, If that's what you feel, that you need more time."

(a-20).

Fourth, the sentencing judge explicitly stated that the defendant's failure to cooperate would affect his sentence:

THE COURT: As far as I know there's been no indication at least up to date, that he's going to give it. I would take one view of this case where he could take that road, and quite a different view of this case if you take the road that you suggest.

(a-18).

Another reference confirms the court's reliance on the defendant's failure to cooperate to enhance the sentence:

"You can make it so easy for me or you can make it difficult for both of us. Do you want to take a week and think about it?"

(a-21).

While the difficulty for the court was the understandably distasteful task of imposing a sixteen year sentence* on a 24 year old defendant, the difficulty for the defendant was far more substantial - extra years of incarceration for refusing to relinquish his Fifth Amendment right to silence.

*He was sentenced to six years incarceration and ten years special parole.

Predicated as it was on this impermissible consideration, the Appellant's sentence must be vacated and the case remanded to a different district court judge for resentencing.

CONCLUSION

FOR ALL OF THESE REASONS THE SENTENCE HEREIN SHOULD BE VACATED AND THE CASE REMANDED TO THE DISTRICT COURT FOR RESENTENCING.

Respectfully submitted,

NANCY ROSNER, ESQ.
Attorney for Appellant
401 Broadway
New York, New York 10013
(212) 925-8844